

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D30333  
H/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - February 23, 2011

PETER B. SKELOS, J.P.  
JOSEPH COVELLO  
RANDALL T. ENG  
CHERYL E. CHAMBERS  
SANDRA L. SGROI, JJ.

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2010-06732

DECISION & ORDER

Carol Ann Foley, respondent, v Russell G. Liloia,  
et al., defendants, Anatoli Tentechikov, et al.,  
appellants.

(Index No. 22423/07)

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Baker, McEvoy, Morrissey & Moskovits, P.C., New York, N.Y. (Colin F. Morrissey  
of counsel), for appellants.

Mitchell J. Winn, Garden City, N.Y., for respondent.

In an action to recover damages for personal injuries, the defendants Anatoli Tentechikov and Atkadiy Kaner appeal from an order of the Supreme Court, Kings County (Schack, J.), dated June 4, 2010, which denied their motion for summary judgment dismissing the complaint insofar as asserted against them on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is reversed, on the law, with costs, and the motion of the defendants Anatoli Tentechikov and Atkadiy Kaner for summary judgment dismissing the complaint insofar as asserted against them is granted.

The appellants met their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 351-352; *Gaddy v Eyler*, 79 NY2d 955, 956-957). In opposition, the plaintiff failed to raise a triable issue of fact. The only medical report submitted by

March 8, 2011

Page 1.

FOLEY v LILOIA

the plaintiff that was in admissible form was from her orthopedic surgeon, Dr. Jerry A. Lubliner (*see Grasso v Angerami*, 79 NY2d 813, 814; *Bernier v Torres*, 79 AD3d 776, 777). However, that medical report was based upon Dr. Lubliner's examination of the plaintiff on April 28, 2010, which was more than four years after the occurrence of the subject accident. Thus, the plaintiff failed to submit any competent medical evidence that was contemporaneous with the subject accident showing initial range-of-motion limitations that were significant in nature (*see Husbands v Levine*, 79 AD3d 1098; *Posa v Guerrero*, 77 AD3d 898, 899; *Srebnick v Quinn*, 75 AD3d 637). Accordingly, the Supreme Court should have granted the appellants' motion for summary judgment dismissing the complaint insofar as asserted against them.

SKELOS, J.P., COVELLO, ENG, CHAMBERS and SGROI, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan  
Clerk of the Court